

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 24, 2006

IN THE MATTER OF K.E.R.

Appeal from the Juvenile Court for Robertson County
No. D-24433 Max D. Fagan, Judge

No. M2006-00255-COA-R3-PT - Filed on August 3, 2006

The Department of Children's Services petitioned the trial court to terminate the parental rights of a mother whose child had tested positive for cocaine at birth. The court granted the petition, finding among other things that while the child was in foster care, the mother continued to use cocaine, had not successfully corrected the conditions that led the Department to assume custody of the child, and that termination was in the child's best interest. The mother appealed. We affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Liberty N. Lander-Dyer, Gallatin, Tennessee, for the appellant, A. A. H.

Paul G. Summers, Attorney General and Reporter, Elizabeth C. Driver, Assistant Attorney General; Jennifer L. Evans, Guardian ad Litem, Springfield, Tennessee, for the appellee, State of Tennessee, Department of Children's Services.

OPINION

I.

K.E.R. was born prematurely on July 27, 2003. Her birth weight was extremely low, and she suffered from pneumonia. Testing revealed that there was cocaine in the infant's system. The Department of Children's Services (DCS) petitioned the Juvenile Court for an order of protective custody, contending that drug usage by A. A. H. (Mother) rendered her incapable of properly caring for her child.

The juvenile court granted the petition and appointed a guardian ad litem to protect the child's interests. On September 18, 2003, the court conducted an adjudicatory hearing. All parties

were present, and Mother was represented by appointed counsel. The court found that K.E.R. was a dependent and neglected child within the meaning of the law and that it was in her best interest that custody be retained by DCS. Mother did not appeal the juvenile court's order.

The infant was placed in foster care following the court's first order of protective custody. She proved to have continuing respiratory problems that were apparently related to Mother's use of crack cocaine during her pregnancy. The foster mother, who maintained custody of the child up to and including the final hearing on the termination petition, learned how to give the child breathing treatments with albuterol and other medications, which were administered on a daily basis.

As the infant struggled to develop and grow, Mother had to deal with the consequences of her past and continuing activities. Shortly after the birth of K.E.R., Mother was jailed for a violation of probation, and she remained incarcerated for the following six and a half months. During this period of incarceration, Mother went through a court-ordered drug rehabilitation program at Buffalo Valley. She successfully completed the program. After she was released from jail on March 8, 2004, she relapsed. She subsequently went for outpatient treatment at Renewal House, an alcohol and drug treatment center. She did not complete the treatment.

Mother was returned to jail in August of 2004 as the result of a misdemeanor theft charge. She received no drug treatment during this incarceration. She was released on January 28, 2005. Shortly thereafter, she entered a drug treatment outpatient program at Meharry. After leaving the program, she again relapsed. She was returned to jail on October 1, 2005, on a charge of prostitution. Mother was incarcerated for a total of thirteen months during the twenty-seven month interval between K.E.R. being taken into DCS custody and the date of the termination hearing.

II. PERMANENCY PLANS

Shortly after taking custody of K.E.R., DCS drafted a detailed permanency plan with the stated goals of returning the child to Mother or placement with a relative. The plan gave Mother twelve months as a "projected date to achieve permanency." The DCS caseworker explained to Mother that failure to comply with the terms of the plan might be grounds for termination of her parental rights, and Mother signed the plan.

The plan contained a list of responsibilities, risks and problems that Mother would have to address in order to make it safe for her child to be returned to her. The first item on the list was Mother's addiction to cocaine. To deal with this risk, Mother was required to have an alcohol and drug assessment, to follow all recommendations of the therapist or counselor, and to submit to random drug screens, with the desired outcome that she would become drug-free for her daughter's sake.

Other requirements in the plan included completion of parenting classes and psychological assessments, obtaining gainful employment, establishing suitable housing, and learning CPR for

infants so she would be able assist K.E.R. if she went into a respiratory crisis.¹ A subsequent permanency plan imposed many of the same requirements upon K.E.R.'s father.²

As the above discussion demonstrates, Mother was not successful in becoming drug-free. Although she did complete some treatment programs, she consistently went back to using drugs. The proof also showed that she failed four drug screens, refused the Department's requests for hair follicle drug screens, and failed to appear for one requested urine drug screen. Although she did complete some parenting classes, she was unsuccessful in obtaining employment or establishing suitable housing.

Like Mother, K.E.R.'s father was a cocaine user with a history of criminal activity. He had previously lost his parental rights to two other children. Incarcerated for seven months after K.E.R. came into DCS custody, he was furloughed from jail for six months to undergo a drug treatment program with Lighthouse Ministries. He completed the program, but went back to using cocaine after the treatment was over. He testified at the termination hearing that he had refused hair follicle drug screens because he felt it was an invasion of his privacy. Father's rights were terminated in these proceedings, but he has not appealed.

III. TERMINATION PROCEEDINGS

On February 18, 2005, DCS filed a petition to terminate the rights of K.E.R.'s parents. The hearing on the termination petition was conducted over two days. On the first day, November 10, 2005, the only witness to testify was Tiffany Thomas, a DCS caseworker who had worked with K.E.R. and her parents from the time the child first came into DCS custody.

According to her testimony, the most important requirement in the permanency plan for Mother was to address the cocaine use, because none of the other changes required by the plan could be accomplished unless Mother defeated her addiction. Ms. Thomas testified as to the efforts DCS had made to assist Mother in achieving the goals of the permanency plan. These included helping to arrange a drug assessment and drug treatments for her, setting up a parenting assessment and

¹ A second permanency plan was executed in August of 2004 which set concurrent goals of adoption or return to Mother. Mother's responsibilities under that plan were essentially the same as the first. They were: to (1) provide a safe home environment, including providing DCS with any changes in address or phone number, not associating with alcohol or drug addicts, and maintaining a smoke-free home; (2) refrain from using illegal drugs or abusing prescription drugs, including continuing to have negative drug screens, completing drug treatment at Renewal House, and participating in aftercare treatment; (3) maintain good mental health, including following-up on her psychological evaluation, renewing her TennCare insurance, continuing therapy at Centerstone, and working with Residential Services, Inc. "RSI" to address recommendations of her psychiatric evaluation; (4) maintain stable income, including providing proof of income to DCS, budget counseling with RSI, and financial classes; (5) participate in vocational assessment and job training through Renewal House; and (6) demonstrate knowledge of age appropriate behavior in K.E.R. through visits and work with RSI.

² After a paternity test showed that D.R. was the father of K.E.R., a permanency plan was executed by him with similar goals.

parenting classes, sending Mother for a psychological assessment, and arranging weekly supervised visitation (including transportation) between Mother and K.E.R. during the periods when Mother was not incarcerated.

Despite these efforts, Mother was never able to resolve her problems with cocaine addiction. She did work for a few months when she was out of jail, but she failed to obtain stable housing or employment. Because of her lengthy incarceration, she also failed to establish a meaningful relationship with K.E.R. Quarterly reports by the Foster Care Review Board which were entered into the record indicated that the child's physical, emotional and medical needs were being met by the foster parents.

The second hearing day was November 30, 2005. The only witnesses to testify were the foster mother, Mother, and Father. Mother was incarcerated on the date of the hearing and had to be brought from jail to attend court.

The foster mother testified as to K.E.R.'s physical and emotional development and the treatments she administered for the child's respiratory problems. She stated that she had no interactions with Mother or with the child's father outside of court, because all the supervised visitations were conducted elsewhere. However, K.E.R.'s maternal grandmother enjoyed regular visitation with the child in the foster mother's home. The foster mother testified that she already had a six year-old adopted daughter and a three year-old adopted son, and that she hoped to adopt K.E.R.

When Mother took the stand, she testified that she was pregnant and that K.E.R.'s father was also the father of her unborn child. She admitted that she had used cocaine and marijuana with the father before she became aware that she was pregnant. Mother declared that she wanted to free herself from her addiction, and she showed remorse for allowing it to have such a destructive effect on her life.

Mother expressed a desire to go to Hope Center, an inpatient drug treatment program which includes vocational training. She had heard good things about the center, and had been in contact with an administrator there, but was told that she could not apply until she was out of jail. However, she was unsure when she would be released.

Mother testified that when she was out of jail she had sought employment at gas stations, restaurants, and a temporary labor agency, but had no success. She also testified that DCS had arranged for her to undergo a psychological examination, and that the psychologist had diagnosed her with post traumatic stress disorder brought about by child abuse and with several other psychiatric disorders. He prescribed Seroquel, Effexor and Klonopin to treat her conditions. She took those medications as directed for a while, but had to stop because of her pregnancy.

Mother acknowledged that K.E.R. was in a good home, was being well cared for, and was fine where she was because "I know that she's with people that love her." Mother testified that when she is out of jail she usually lives with her mother, and sometimes with her grandmother, but

admitted that neither of them is in a position to take the child. Mother stated that she did not believe that removing K.E.R. from the foster mother's home would be in the child's best interest, but said she wished to remain in her child's life while she worked to straighten out her own life, which led to the following exchange with the attorney for the state:

Q. You realize that you trying to get your life together is putting her life on hold?

A. I never thought of it that way.

We need not discuss in any detail Father's testimony, except to say that it indicated attitudes and experiences very much like Mother's. Like her, Father was addicted to crack cocaine, had completed drug treatment, but had subsequently relapsed. When he was out of jail, he lived with his own mother. He sometimes was able to work and pay support for K.E.R. through payroll deductions, but his visitation with the child was more sporadic and perfunctory than Mother's.

At the conclusion of testimony and of closing arguments, the juvenile court announced its decision to terminate the parental rights of both parents. The decision was memorialized in an order filed December 29, 2005, which contained detailed findings of fact and conclusions of law. The court found that three grounds for termination had been proven by clear and convincing evidence: substantial noncompliance with the permanency plans, Tenn. Code Ann. § 36-1-113(g)(2); persistence of conditions, Tenn. Code Ann. § 36-1-113(g)(3)(A); and abandonment, Tenn. Code Ann. § 36-1-102. The court also found that there was clear and convincing evidence that it was in the best interest of K.E.R. that Mother's rights be terminated. Mother appealed.

IV. REQUIREMENTS FOR TERMINATION

A court may terminate a person's parental rights only if the party seeking termination proves by clear and convincing evidence (1) the existence of at least one statutory ground and (2) that termination of the parent's rights is in the best interest of the child. Tenn. Code Ann. § 36-6-113(c); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

The higher evidentiary standard and additional procedural safeguards were established to prevent unwarranted government interference, through the court's orders, with a parent's fundamental and constitutionally protected right to the care and custody of his or her children. *Santosky v. Kramer*, 455 U.S. 745, 769, 102 S. Ct. 1388, 1403 (1982) (holding that because of the fundamental nature of the interest at stake and the risk of erroneous decision with grievous consequences in termination proceedings, due process requires an evidentiary standard at least as stringent as clear and convincing evidence); *see also In Re Adoption of a Female Child*, 896 S.W.2d 546, 547 (Tenn. 1995); *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn. 1994) (discussing the fundamental constitutional rights of parents).

Our legislature has identified those situations in which the state's interest in the welfare of a child may justify interference with a parent's constitutional rights by setting forth grounds upon

which termination proceedings can be brought. Tenn. Code Ann. § 36-1-113(g). The statutes on termination of parental rights provide the only authority for a court to terminate a parent's rights. *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004). Thus, parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). To support the termination of parental rights, only one ground need be proved, so long as it is proved by clear and convincing evidence. *In the Matter of D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003).

V. GROUNDS

A. Non-Compliance with the Permanency Plan

On appeal, Mother's attorney challenges every ground for termination found by the trial court. The first ground, set out at Tenn. Code Ann. § 36-1-113(g)(2) is that "[t]here has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care. . . ."

Whether there has been substantial noncompliance with a permanency plan is a question of law, to be reviewed on appeal *de novo* with no presumption of correctness. *In Re Valentine*, 79 S.W.3d 539, 548 (Tenn. 2002). Not every failure to comply with a permanency plan will furnish grounds for termination. "Trivial, minor, or technical deviations from a permanency plan's requirements will not be deemed to amount to substantial noncompliance." *In re M.J.B.*, 140 S.W.3d 643, 656 (Tenn. Ct. App. 2004). Whether a failure to comply with a permanency plan is substantial depends upon the degree of non-compliance and the weight assigned to the requirements that the parent fails to comply with. *In Re Valentine*, 79 S.W.3d at 548.

Mother argues that the court erred in finding that she had substantially failed to comply with the permanency plans prepared by DCS. She admits that she was unable to remain drug free, but her brief on appeal states that "the truth is clear that [Mother] had come to terms with the fact that she had a problem and was making great strides and progress in addressing it."

Mother's own testimony shows, however, that she actually made very little progress in dealing with her addiction. While she may have become aware that her crack cocaine habit was indeed a great problem, she failed at every attempt to free herself from it. She had entered three different programs for treatment, and apparently completed two, but went back to cocaine use after leaving the program each and every time. During the termination hearing, she indicated that she was resting a great deal of hope on yet another program, but there was no proof that she could be admitted into the program, let alone that it would work. Thus, the proof showed that Mother had failed to comply with the requirement of the permanency plan which her caseworker had identified as the most important.

As for other important requirements of the plan, Mother insists that she made a genuine effort to satisfy them, but was prevented from doing so by conditions beyond her control, including DCS's

failure to give her adequate assistance. Under most circumstances DCS is obligated to make reasonable efforts to help bring about a reunification of parent and child once it removes a child from the parent's custody. Tenn. Code Ann. § 37-1-166(a)(2). Such efforts must be reasonable, but they need not be herculean. *State of Tennessee Department of Children's Services v. T.N.S.S.*, No. E2003-02935-COA-R3-PT, 2004 WL 3021132 (Tenn. Ct. App. Dec. 30, 2004) (no Rule 11 perm. app. filed).

In the present case, the confluence of Mother's drug abuse and incarceration made it difficult for DCS to render effective assistance for her in matters of employment and housing. DCS did arrange for Mother to undergo drug treatment, but the success of that treatment rested on Mother's shoulders. DCS also arranged for parenting classes and a psychological assessment and organized supervised visitation between Mother and child when Mother was not incarcerated. It also furnished transportation so Mother could attend drug treatment at Meharry and exercise visitation with her child.

Mother points to the fact that she had applied for a job with a number of different businesses, but did not receive any real offers. She implies that the failure of DCS to perform a vocational assessment was a factor in this outcome. However, her periodic incarcerations and continued cocaine use were likely greater deterrents to gainful employment.

In sum, the record contains clear and convincing evidence that Mother did not even come close to complying with the most important requirements of the permanency plan. Consequently, the evidence supports the trial court's finding as to this ground. While only one statutory ground need be proven to support a termination of parental rights, we will also discuss the other grounds found by the trial court in the interest of thoroughness.

B. Persistence of Conditions

Mother also asserts that the trial court erred by finding grounds for terminating her parental rights for persistence of conditions under Tenn. Code Ann. § 36-1-113(g)(3). That ground applies where a child has been removed from the home of the parent or guardian by a court order for a period of six months or more, and

(i) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(ii) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(iii) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

Tenn. Code Ann. § 36-1-113(g)(3).

In this case, K.E.R. had been removed from Mother's custody for well over two years. The conditions that led to K.E.R.'s removal were Mother's use of cocaine, its physical effect on the newborn infant, and its effect on Mother's ability to parent. Mother's periodic incarceration, her lack of employment, and the absence of stable housing were additional factors likely to cause the child to be subjected to further neglect if she were returned to Mother. At the time of the termination hearing, it appeared unlikely that any of those conditions would be remedied at an early date.

Since overwhelming evidence presented at trial indicated that over a period of two years and four months, Mother had failed to correct the conditions that made it unsafe to return K.E.R. to her, that there was very little indication of an imminent change of a sufficiently substantial nature, and that continuation of the parental relationship would block a prospective adoption, we conclude that the trial court did not err in finding clear and convincing evidence of persistence of conditions as a separate ground to support the termination of Mother's parental rights.

C. Abandonment

The final ground for termination found by the trial court was abandonment in accordance with the definition found in Tenn. Code Ann. § 36-1-102(1)(A)(ii):

The child has been removed from the home of the parent(s) or guardian(s) as the result of a petition filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department or a licensed child-placing agency, that the juvenile court found, or the court where the termination of parental rights petition is filed finds, that the department or a licensed child-placing agency made reasonable efforts to prevent removal of the child or that the circumstances of the child's situation prevented reasonable efforts from being made prior to the child's removal; and for a period of four (4) months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date.

The record shows that the circumstances of K.E.R.'s birth gave DCS little choice other than to remove the infant from Mother's care. There is also no evidence that Mother made any effort to obtain suitable housing in the four months after removal. But in light of her incarceration, such efforts might not have been possible. Also, it is unclear whether the Department made any efforts to help Mother procure housing during this particular period. Thus, we do not believe the record contains clear and convincing evidence of abandonment under Tenn. Code Ann. § 36-1-

102(1)(A)(ii). However, since other grounds have been proven under the enhanced standard of proof, the only remaining question is best interest of the child.

VI. Best Interest

Once grounds for termination have been established, the court must determine whether there is clear and convincing evidence that termination of the parents' rights is in the best interest of the child. Our legislature has set out some factors for the courts to consider in determining a child's best interest.

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition; (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i).

When we consider these factors in the present case, we find almost all of them weigh in favor of terminating the parental relationship. We do not think it necessary to recite Mother's actions or describe her situation yet again, but it is clear that she has not created conditions that would make it possible for K.E.R. to be safely returned to her any time in the immediate future.

Further, the child was removed from Mother's custody right after her birth, and although Mother did manage to visit with K.E.R. when she was not incarcerated, a meaningful relationship never developed between them. In short, we see little benefit for the child in continuing the relationship with Mother and little detriment to her from its termination. We therefore hold that the trial court did not err in finding clear and convincing evidence that termination of Mother's parental rights was in K.E.R.'s best interest.

VII.

The judgment of the trial court is affirmed. Costs of this appeal are assessed against the appellant, A. A. H.

PATRICIA J. COTTRELL, JUDGE